United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-2017

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2017

SALVATORE ANNUNZIATO,
Appellee

vs.

JOHN R. MANSON, COMMISSIONER OF CORRECTIONS,
Appellant

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Questions Presented	3
Statement of Facts	3
Argument	
I. The Limitation On The Cross-Examination Of Bruce Pino Was Not Of Constitutional Dimension And, If It Was, The District Court Erred In Failing To Honor The State Courts Finding Of Fact That, In The Context Of Petitioners Trial, The Error Was Harmless Beyond A Reasonable Doubt	10
II. The District Court Erred In Finding, On The Basis Of The Inadequate Record Before It, That This Case Represented Prosecutorial Misconduct In Suppressing So-Called Brady Information, Such That The Petitioner Was Denied A Fair Trial	18
Conclusion	27

TABLE OF CASES

CASES	PAGE
Alford v. *United States*, 282 U.S. 687 (1931)	15
Annunziato v. *Manson*, Docket No. 25, 827	2, 26
Brady v. *Maryland*, 373 U.S. 83 (1963)	9
Brookhart v. *Janis*, 383 U.S. 1 (1966)	13, 14
Chapman v. *California*, 386 U.S. 18 (1967)	11
Davis v. *Alaska*, 415 U.S. 308 (1974)	13, 14, 16, 17
LaVallee v. *Della Rose*, 410 U.S. 690 (1973)	14, 18
Milton v. *Wainwright*, 407 U.S. 371 (1971)	11
Ray v. *United States*, 412 F.2d 1052 (1969)	11
Smith v. *Illinois*, 390 U.S. 129 (1968)	13
State v. *Annunziato*, 169 Conn. 517 (1975)	9, 10, 26
Tanner v. *Vincent*, 541 F.2d 932 (1976)	14, 17, 18, 25
United States v. *Agurs*, 96 S. Ct. 2392 (1976)	25
United States v. *Blackwood*, 456 F.2d 526 (1972)	15, 16
United States v. *Harvey*, Docket No. 76-1183	14, 17
United States v. *Hilton*, 521 F.2d 164 (1975)	24
United States v. *Kahn*, 472 F.2d 272 (1973)	24
United States v. *Miles*, 480 F.2d 1215 (1973)	16
United States v. *Miller*, 411 F.2d 825 (1969)	24
United States v. *Ong.*, Docket No. 76-1087	16, 17
United States v. *Reed*, 437 F.2d 57 (1971)	11
United States ex rel. Sabetta v. *Follette*, 432 F.2d 572	14, 18
United States v. *Sperling*, 506 F.2d 1323 (1974)	24
United States v. *Stassi*, 544 F.2d 579 (1976)	25
United States v. *Stofsky*, 527 F.2d 237 (1975)	25
United States v. *Turcotte*, 515 F.2d 145 (1975)	15, 17
Winford v. *Swenson*, 517 F.2d 1114 (1975)	14, 18

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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

This is an appeal from the judgment of the court (Blumenfeld, J.) entered in the United States District Court for the District of Connecticut at Hartford on January 21, 1977. In that judgment, the court granted the Petition for a Writ of Habeas Corpus made by Salvatore Annunziato, a prisoner in the State of Connecticut, and ordered that the Petitioner be released from custody unless the State of Connecticut accorded him a new trial within sixty days of judgment.

On February 22, 1977, the Second Circuit Court of Appeals granted the request of the Respondent, John R. Manson, that the implementation of the judgment be stayed pending determination of this appeal.

The Petitioner, Salvatore Annunziato, had originally been found guilty, along with his son. Francesco Annunziato, of the crime of Conspiracy to Commit Murder in violation of then Section 54-197 of the Connecticut General Statutes, in the Superior Court of New Haven County, on March 3, 1971.

On April 2, 1971, the Petitioner was sentenced to a term of imprisonment in the Correctional Institution at Somers for not less than nine nor more than fourteen years.

The Petitioner appealed the verdict, which appeal was decided unfavorably to the Petitioner by the Supreme Court of the State of Connecticut in a case entitled *State* v. *Annunziato,* 169 Conn. 517, 363 A.2d 1011 (1975).

On December 2, 1975, the Petitioner filed a Petition for a Writ of Habeas Corpus in the District Court, claiming several of the same grounds for error that had been asserted before the Supreme Court of Connecticut, but adding the additional claim that the prosecution had withheld certain exculpatory information, thereby denying him of his constitutional right to due process of law. Relying on the basis that the state courts had never had a chance to pass judgment on his additional claim the court (Blumenfeld, J) denied the total application without prejudice to same being revived once the Petitioner's state remedies had been exhausted as to the exculpatory evidence claim.

On July 7, 1976, the Superior Court of Connecticut (Martin, J.) in an unreported decision, *Annunziato* v. *Manson*, Docket No. 25,827 (Superior Court, Litchfield County) denied the Petitioners application for a Writ of Habeas Corpus based on the exculpatory evidence claim and, subsequently, (on July 15, 1976) denied the Petitioners Petition for Certification to the Connecticut Supreme Court.

His state remedies having been exhausted the Petitioner thereupon renewed his request for the Writ in the District Court, which was granted, as aforesaid, on January 21, 1977.

The Respondent here appeals from said judgment.

QUESTIONS PRESENTED

I. Whether the limitation on the cross-examination of Bruce Pino is of constitutional dimension and, if it was, whether the District Court erred in failing to honor the State Courts' finding of fact that, in the context of Petitioners trial, the error was harmless beyond a reasonable doubt?

II. Whether the District Court erred in finding, on the basis of the inadequate record before it, that this case represented prosecutional misconduct in suppressing so-called Brady material, such that Petitioner was denied a fair trial?

STATEMENT OF FACTS

(This statement of facts shall be annotated to pages of the trial transcript, which was entered as Plaintiffs Exhibit A during the Hearing on the Merits held before Blumenfeld, U.S.D.J. on January 26, 1976, and will become part of the record before this Court on appeal)

On the trial of this case to the jury, the state offered evidence to prove that on August 10, 1968, Edward Gould went to Chip's Lounge in the Fair Haven section of New Haven, Connecticut, to pick up a prescription which had been left there for him by the druggist whose place of business was next door to Chip's Lounge. (Tr. p. 29) Gould was observed entering Chip's Lounge at about 9:30 P.M. by Bruce Pino (Tr. pp. 685, 761);

Dominick Onofrio (Tr. p. 949); John Early, the bartender (Tr. p. 1017); Judith Papero, a waitress (Tr. p. 1152); and Ralph Masselli (Tr. p. 595). Sidney Levanthal, the next door druggist, stated to the police that he remembered dropping the prescription off at Chip's Lounge on the night of August 10, 1968. (Tr. p. 110)

When Edward Gould arrived at Chip's there was a party in progress which was attended, inter alia, by Salvatore Annunziato, Francesco Annunziato, Richard Biondi, Ralph Masselli, Jackie Reed, Arthur Murgo, Edward Reed and Bruce Pino. (Tr. pp. 31-32, 678-679) Gould picked up his prescription at the bar and then was approached by the Petitioner, Salvatore Annunziato, who talked with him briefly, and then took him into the back room of Chip's and introduced him to several people at a table. (Tr. p. 33) Gould then returned to the bar by himself and had 3 to 5 drinks, during which time he observed Francesco Annunziato sitting at the other end of the bar. (Tr. p. 33)

Although Gould was drinking on the night of August 10, he was not drunk (Tr. p. 327) and he was observed by several other people that night who observed that he was not drunk, including Officer Lawrence Celso of the New Haven Police Department, (Tr. p. 459); Ralph Masselli, (Tr. p. 595); Bruce Pino, (Tr. p. 716); and Judith Papero, (Tr. p. 1157).

While Gould was drinking at the bar, he observed Salvatore Annunziato go and sit at a table with friends, where Richard Biondi approached him and bent over and whispered with him for several minutes. (Tr. p. 38) Richard Biondi then went into the back room for a period of time. (Tr. p. 38)

Later in the evening while at Chip's Lounge, Bruce Pino observed Richard Biondi talking to Salvatore Annunziato, who is also know as "Midgie". (Tr. p. 687) Immediately after talking to Salvatore Annunziato, Richard Biondi approached Bruce Pino and asked him to take his girlfriend, Regina, home because he [Biondi] had "some business to do for Midgie." (Tr. p. 687) Immediately after making this request, Biondi went outside. (Tr. p. 687)

At about 12:30 A.M., Gould left Chip's Lounge and was met outside the front door by Richard Biondi and Francesco Annunziato, who asked Gould to give them a ride up the street to Francesco's car. (Tr. p. 39) Gould agreed to give them a ride and walked across the street to where his borrowed 1964 Ford Sedan was parked. (Tr. p. 40) Gould got in the driver's seat, Biondi got in the right front passenger's seat and Francesco got in the back. (Tr. p. 40)

While Bruce Pino was looking around Chip's Lounge to find Biondi's girlfriend, Regina, he looked out the front door of Chip's and saw Gould, Biondi and Francesco Annunziato getting into Gould's car, and observed the car drive off down Grand Avenue. (Tr. pp. 688-689, 855)

Francesco instructed Gould to proceed to the corner of Grand and Ferry and take a right, which would have taken them in the direction of East Rock Park (Tr. p. 41), but Gould took a left instead. (Tr. p. 41) As he took a left turn he saw a gun in the rearview mirror. (Tr. p. 43) He jammed on the brakes, opened the door, and jumped from the car as it was still moving, heard a shot go off, and felt something hit him in the back as he exited the car. (Tr. p. 44) He rolled on the ground, then got up and ran across a parking lot, ran behind a gas station, then back across Grand Avenue, sought refuge at

several houses, and finally found refuge in a house on Bright Street. (Tr. pp. 44-45)

Detective Nicholas Pastore went to the scene of the shooting in the early morning of August eleventh and examined the car which had jumped the curb, finding a bottle of medication in the car prescribed for Edward Gould. (Tr. pp. 454-456) Detective Pastore then went to Edward Gould's home, observed Gould with a wound in the shoulder, and took him to the hospital. (Tr. pp. 457-459)

That night, Officer Lawrence Celso observed Richard Biondi at St. Raphael's Hospital with a bullet wound in his left knee, accompanied by Francesco Annunziato. (Tr. pp. 431-432) Biondi was unwilling to make any statement to Officer Celso. (Tr. p. 432)

On the next day, August 11, Bruce Pino went to Mike's Restaurant where he saw Francesco Annunziato, Salvatore Annunziato, Nicholas Celone, and a few other people. (Tr. p. 693) Pino observed that Salvatore Annunziato was speaking in a loud voice, and was swearing, and that he said "Frankie can't do nothing right." (Tr. p. 694) Francesco did not respond to the Petitioner's statement. (Tr. p. 696)

In March of 1970, Edward Gould had a conversation with Salvatore Annunziato in which Gould asked Annunziato why he had tried to have him killed and the Petitioner replied, "I want to kill you because you killed my brother-in-law", Sonny Gondak. (Tr. p. 78) Sonny Gondak was killed by a hit and run motorist in June of 1968 on State Street in New Haven, after alighting from a car driven by Edward Gould. (Tr. pp. 79, 395-397)

In July of 1968 Gould went into Chip's Lounge and saw Salvatore Annunziato there and had a few drinks with him. (Tr. p. 23) Hostility developed between Gould and Annunziato, and the Petitioner said to Gould, "Well, you always wanted to be a tough guy, You always hated Guineas. I have to go to New York anyway, so enjoy your life." (Tr. p. 24) When Gould asked Annunziato what he meant by this statement, Salvatore Annunziato replied, "We'll see." (Tr. p. 24)

Later in July of 1968 Edward Gould was in the Chapel and Ferry Restaurant when Salvatore Annunziato entered the restaurant and said to him "A nephew wants to see you down at Chip's Lounge. Why don't you go down to see him?" (Tr. p. 28) When Gould asked what the nephew wanted, Salvatore Annunziato replied, "Why don't you go down and find out?" (Tr. p. 22)

Gould was associated with a group of men which included Edward Devlin, Johnnie Reynolds and Tommy Viola. (Tr. p. 398) Edward Devlin was the leader of Gould's group of associates and Gould was Devlin's closest associate in the group. (Tr. pp. 401-402)

Salvatore and Francesco Annunziato were not members of Gould's group of associates but were members of a different group of associates, which included Richard Biondi, Bruce Pino, Nicholas Celone, Vincent Benneditti and Donald Lambert. (Tr. pp. 399-401) Salvatore and Francesco's group of Associates were often seen together at Chip's Lounge. (Tr. p. 401)

Edward Gould had observed incidents indicating that Salvatore Annunziato was the leader of his group of Associates, (Tr. p. 404) and Bruce Pino observed that Salvatore Annun-

ziato would give orders which his associates would follow. (Tr. p. 673)

Prior to the middle of June, 1968, Edward Devlin and Salvatore Annunziato were social friends, and were seen together in Chip's Lounge several times a week, but their relationship terminated abruptly, in the middle of June and Devlin was not seen in Chip's after then. (Tr. pp. 674-75, 655, 670) In June or July of 1968 Gould was in Chip's Lounge and mentioned to Salvatore Annunziato that he had just spent the day with Edward Devlin. The Petitioner replied, "He is a nice guy. Leave it that way. I don't want to particularly hear his name." (Tr. p. 413) At a later date, Gould again met Salvatore Annunziato in Chip's Lounge and again mentioned Devlin's name and Annunziato replied, "I don't want to hear his name around here." (Tr. p. 413)

Francesco Annunziato is the son of Salvatore Annunziato. (Tr. p. 674) Salvatore Annunziato would sometimes "huddle" in a corner with certain of his associates, particularly Richard Biondi and Francesco Annunziato. (Tr. pp. 673-674) Francesco Annunziato and Richard Biondi were Salvatore Annunziato's closest associates. (Tr. pp. 408-409) When Salvatore Annunziato rode in his automobile, Richard Biondi or his son Francesco would drive for him. (Tr. pp. 409-410)

During the trial, the Petitioner was not allowed to cross-examine the witness, Bruce Pino, about charges then pending against him for Possession of Marijuana and Being a Second Offender. (See Appendix, pp. 35a-36a; Tr. pp. 773-795)

The defendant claimed in the Supreme Court of Connecticut that this limitation of the cross-examination was prejudicial error since it deprived him of any opportunity to show a bias

or motive for testifying in that witness. The State Supreme Court found this limitation to be error but found same to be harmless in the overall context of Petitioner's trial. See *State* v. *Annunziato, supra*, 169 Conn. at pp. 523-527; 363 A.2d at pp. 1016-1018. This ruling did not satisfy the District Court (Blumenfeld, J.) and that court substituted it's own independent evaluation of the prejudicial impact of this limitation on cross-examination and found that the error was not harmless beyond a reasonable doubt. (See Document No. 13, Memorandum of Decision, pp. 4-9; App. pp. 9a - 16a)

Subsequent to the Petitioners trial and after his appeal had already been argued, the Petitioner learned that the witness, Pino, in another Superior Court criminal proceeding, had testified (as brought out by the State of Connecticut, on it's direct examination) that he had received certain "promises" or "deals" in return for his testimony in the Petitioner's trial. Claiming that the existence of such a "deal" was exculpatory information which should have been revealed pursuant to the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963) and it's progency, the Petitioner raised this claim for the first time in his original petition for a Writ of Habeas Corpus. (Document No. 1, Record on Appeal; App. pp. 2a - 8a)

The District Court refused consideration of this particular claim until such time as it had been presented to the state courts. This was done and the habeas court (Martin, J.), after a review of the entire trial. determined that the Petitioner had not been deprived of any Constitutional right to due process by the failure to reveal the existence of the alleged "deal."

Once again, the District Court (Blumenfeld, J.) was not satisfied with this state court finding of fact and determined to substitute his own judgment as to the prejudicial impact of

the failure to reveal on Petitioner's trial. The District Court found that Petitioner had been denied a fair trial and granted the Writ unless the state were to retry the Petitioner within sixty-days. (Document No. 13, Memeorandum of Decision, pp. 9-20; App. pp. 16a-26a)

ARGUMENT

I.

THE LIMITATION ON THE CROSS-EXAMINATION OF BRUCE PINO WAS NOT OF CONSTITUTIONAL DIMENSION AND, IF IT WAS, THE DISTRICT COURT ERRED IN FAILING TO HONOR THE STATE COURTS FINDING OF FACT THAT, IN THE CONTEXT OF PETITIONERS TRIAL, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Petitioner claimed before the District Court that he had been denied his sixth and fourteenth amendment rights to confront the witness against him by the refusal of the trial court to allow the cross-examination of two witnesses, Bruce Pino and Judith Papero, concerning the pendency of criminal proceedings against them to which not guilty pleas had been entered, to show their interest and motive for testifying.

The Supreme Court of Connecticut ruled, in *State* v. *Annunziato*, 169 Conn. 517, 523-527, 363 A.2d 1011, 1016-1018 (1975), that the trial court had erred in refusing to allow cross-examination as to the pending charges but that such error had been harmless in the overall context of Petitioners trial. It is admittedly difficult to determine whether the state court determined harmlessness on the basis that the limitations on cross-examination violated state evidentiary law or that federal

constitutional standards applied. In ruling that the error had been harmless, however, the court cited *Milton* v. *Wainwright*, 407 U.S. 371, 93 S. Ct. 2174, 33 L. Ed.2d 1; *United States* v. *Reed*, 437 F.2d 57, 58-59 (2d Cir. 1971) and *Ray* v. *United States*, 412 F.2d 1052, 1054 (9th Cir. 1969) along with several state court decisions so the application of the federal constitutional standard of harmlessness beyond a reasonable doubt; *Chapman* v. *California*, 386 U.S. 18 (1967); may be reasonably inferred.

Within this context, the state Supreme Court found that any error was vitiated because there was independent evidence of the Petitioners guilt other than the testimony of Bruce Pino and that the jury had an opportunity to learn of Pino's reasons for testifying through other means. Thus, the state court ruled: (at 363 A.2d 1011, 1017):

> "On cross-examination the defense brought out that Pino had been convicted of: (1) possession of burglary tools, (2) four counts of statutory burglary; (3) conspiracy to violate 18 U.S.C. 2113 (a) which involved bank robbery; and (4) possession and passing of counterfeit money. Pino denied having been convicted of possession of firearms in Florida. At the beginning of Pino's direct testimony, he admitted to these crimes, plus attempted breaking and entering. On cross-examination defense counsel also brought out that Pino decided to talk to the police just prior to being tried for bank robbery [Tr. p. 726] that Pino, when he talked to the police about the Gould incident was hoping for leniency, [Tr. pp. 843, 844, 845] that Pino knew he could get up to twenty-five years on the federal bank robbery charges [Tr. p. 840]; that Inspector Ahern of the New Haven Police Department had told him that he would do everything in his power to secure leniency in the federal case [Tr. p. 845]; and that after Pino talked to the police about the Gould incident he subse-

> quently received a suspended sentence in the bank robbery case. [Tr. p. 844] It was also elicited that Pino had signed a written confession admitting the crime of arson, and that he had never been arrested for this crime. [Tr. p. 842] He was also questioned about his extensive and illegal use of drugs. [Tr. pp. 850-855] Another witness testified for the defense that, while in jail with Pino, Pino told him that "Mr. Ahern told him [Pino] if he could come up with some concrete information about [the Petitioner] . . . they would drop his bank robbery charge." [Tr. p. 975] It is evident that the jury was fully apprised of the circumstances surrounding Pino's decision to testify and of any bias, interest or motive for them to appraise properly his testimony. The added evidence that Pino had pleaded not guilty to narcotics charges would have been purely cumulative and of no real significance in view of the evidence showing the facts and circumstances surrounding Pino's decision to testify and the interest he had in testifying against the defendant, as well as the argument of defense counsel of such circumstances and the court's charge. . ."

The state appellate court's ruling that there had been error in the limitation on cross-examination as to the pending charges but that same had been harmless error, was unacceptable to the District Court (Blumenfeld, J.) who ruled that the jury's failure to hear (in addition to all that the jury had heard, as outlined, *supra,*) that the witness had pending a possession of marijuana charge raised this error to one of constitutional dimension, and the court then proceeded to make it's own independent judgment on a fact already decided by the state court, to wit, that said error had been harmless, and found that this error, *alone,* was sufficient to justify issuance of the writ of habeas corpus.

The District Court's error in so finding appears to have been predicated on several invalid suppositions. The first would be that there had actually been in existence a "deal" with regard to the pending marijuana charges between the witness, Pino, and the prosecution which was not revealed as "exculpatory information." This fact was not known by the Connecticut Supreme Court (since it was not discovered until after they had considered Annunziato's state appeal) and did not color that court's judgment, as it obviously did that of the District Court. Secondly, the District Court placed a heavy reliance on the case of *Davis* v. *Alaska,* 415 U.S. 308 (1974), most particularly the following quote from Chief Justice Burgers decision in *Davis, supra,* at p. 318:

> "The denial of the right to effective cross-examination. . . would be constitutional error of the first magnitude and no amount of want of prejudice would cure it. '*Brookhart* v. *Janis,* 384 U.S. 1, 3'; *Smith* v. *Illinois,* 390 U.S. 129, 131 (1968)."

Surely, what occurred in the state court here—ie, the refusal to allow the simple question about a pending marijuana charge —cannot be presumed to fall, in very instance without question, into the category of a denial of "effective cross-examination" such as to justify the application of the *Davis* rule that this is "constitutional error of the first magnitude and no amount of want of prejudice would cure it." It is submitted that if this reviewing Court accepts the District Courts interpretation of the *Davis* case there will be absolutely no limitation on what the federal courts must do on state habeas corpus applications regarding the slightest limitation on cross-examination, whether based on a state evidentiary or federal constitutional basis. In short, the District Court cannot seriously believe that what occurred in the state court was such as to invoke the *Davis* rule, which seems even to preclude a finding of harmless error.

Thirdly, the District Court did, nevertheless, consider, the harmfulness of the error and entered it's own independent determination on a question of fact—ie, the harmfulness, itself, in the overall context of the Petitioners trial—and failed to follow the traditional principle of deference to the state court's finding of harmless error.

In a federal collateral proceeding, such as the present case the findings of the state court are presumptively correct pursuant to 28 U.S.C. 2254 (d). See *Tanner* v. *Vincent*, 541 F.2d 932, 937 (2nd Cir. 1976); *LaVallee* v. *Della Rose*, 410 U.S. 690, 93 S. Ct. 1203, 35 L. Ed.2d 637 (1973); *Winford* v. *Swenson*, 517, F.2d 1114, 1118 (8th Cir. 1975); *United States ex rel. Sabetta* v. *Follette*, 432 F.2d 572 (2nd Cir. 1970).

The District Court casually dismisses the state court's determination that the error was harmless. This latter finding, however, appears to be predicated on its premise that what occurred here was a constitutional violation of the "first magnitude and no amount of want of prejudice would cure it," *Brookhart* v. *Janis*, 384 U.S. 1, 3. In short, because the District Court is persuaded that *Davis* v. *Alaska, supra*, is the compelling precedent on these facts and the state court did not base it's finding on *Davis*, the state court's finding of fact may be ignored.

It is noteworthy that this Circuit has had occasion to determine the impact of similar limitations on cross-examination as to bias or motivation of a witness within the federal system and has eschewed the principle that *Davis* v. *Alaska*, with it's virtual ironclad invincibility to a finding of harmless error, is always applicable to a limitation of cross-examination. Thus, as this court ruled in *United States* v. *Harvey*, F.2d , Docket No. 76-1183, slip op. 6029, at 6034-6036:

"Although the scope of a defendant's right to introduce evidence of bias is not limitless, and may be restricted as the trial court in it's sound discretion deems proper, *United States* v. *Blackwood, supra,* at 530, it is rarely proper to cut off completely a probative inquiry that bears on a feasible defense. *Cf. Alford* v. *United States,* 282 U.S. 687, 694 (1931) '. . . Although we are mindful that it is within the sound discretion of the trial judge to determine the extent to which he will receive independent evidence for the purpose of proving a witness' hostility, we do not believe that he may, as was done below, exclude all such evidence for that purpose."

In the case of *United States* v. *Turcotte,* 515 F.2d 145, 151 (2nd Cir. 1975), this court considered whether cross-examination of a witness on whether he had any pending charges in a federal case was improper. As this court states: (515 F.2d at 151):

"Finally, defendants complain of two occassions when the trial judge limited the scope of their cross-examination of Kraft concerning his motives to testify falsely in favor of the government. Defendants are usually afforded considerable latitude in exploring such motives in their cross-examination of the principal government witness against them. . .

Here defendants object to the trial court's refusal to allow them to question Kraft about a New Jersey criminal charge of receiving stolen property then pending against him and its refusal to allow them to examine Kraft on whether he had requested to be sentenced on his sports—bribery conviction prior to their trial. . .

The trial court, of course, has discretion in deciding how far defendant can go with such cross-examination. If the jury is otherwise in possession of sufficient information concerning the witness' possible motives for testifying falsely in favor of the government, there is no abuse of

> *discretion if a judge restricts the cross-examination of a government witness, United States* v. *Miles,* [480 F.2d 1215 (2d Cir. 1973)]; *United States* v. *Blackwood,* 456 F.2d 526, 530-31 (2d Cir.), cert. denied, 409 U.S. 863, 93 S. Cr. 154, 34 L. Ed. 110 (1972)." (emphasis added)

Perhaps the best example of this courts unwillingness to use (as the District Court did) the case of *Davis* v. *Alaska,* 415 U.S. 308, 317, 319-20 (1974) as sweeping authority to make *any* limitation upon cross-examination into a constitutional violation of the first magnitude is the case of *United States* v. *Ong,* F.2d , Docket No. 76-1087, slip op. 5517 at 5536-5537 (2d Cir. September 14, 1976). In *Ong,* which involved review of a federal trial courts refusal to allow a witness to be cross-examined about his narcotics activities, this court states: (at pp. 553-637):

> "Finally, we do not agree that the court's order prevented the jury from having 'the benefit of the defense theory before them' by denying a defendant 'the effective cross-examination. . .of an adverse witness.' *Davis* v. *Alaska* . . .In *Davis,* the Supreme Court ensured a criminal defendant of the right under the confrontation clause of the Sixth Amendment to explore through cross-examination the partiality and motivation of a government witness. 415 U.S. at 316. . . We do not believe that the court in *Davis* meant to sanction speculative expeditions into areas only tangentially related to the facts in issue in the some basis for implying an ulterior motive might be found.
>
> *Moreover, the total cross-examination was sufficient to afford the jury a basis to evaluate the defense theory. . . . Under these circumstances the curtailment of Wah's cross-examination did not deprive him of any right of confrontation. . ."*
> (emphasis added)

Clearly, then, this court, in reviewing decisions in the federal courts has refused to provide the *Davis* v. *Alaska* case with the sweeping mantle of authority that the District Court has in this habeas corpus review of a state courts determination. The District Courts judgment is predicated on an independent assessment of the "totality of the circumstances", without any deference shown to the state courts factual determination on that issue, because the District Court believes that what occurred in the state court is barred expressly by *Davis* v. *Alaska*. This court's decision in *United States* v. *Harvey, supra, United States* v. *Turcotte, supra, and United States* v. *Ong, supra,* suggest an unwillingness to apply *Davis* so broadly and a return to a case-by-case determination, on the basis of the facts and circumstances of each particular case, as to whether the limitation on cross-examination amounts — in the first instance — to the level of constitutional dimension and, secondly, where appropriate, whether the error is harmless beyond a reasonable doubt.

By extending *Davis* to the facts of this case, the District Court applied that case in a manner which the Second Circuit has been unwilling to apply same to similar factual situations within the federal system. Surely principals of federal-state comity dictate that no lesser a standard be applied to federal habeas corpus review of state court proceeding than apply within the federal system in reviewing federal court decisions. The District Court has erred, here, by over-extending the scope of its review of the state courts determination. Had the proper standard been applied, the well-reasoned and documented finding of the state court that the limitation on cross-examination was error, but that it was harmless, would have been acceptable to the District Court, per 28 U.S.C. §2254 (d); *Tanner* v. *Vincent*, 541 F.2d 932, 937 (2nd Cir. 1976).

II.

The District Court Erred In Finding, On The Basis Of The Inadequate Record Before It, That This Case Represented Prosecutorial Misconduct In Suppressing So-Called Brady Information, Such That The Petitioner Was Denied A Fair Trial.

The Respondent is particularly disturbed with the District Court's finding in this case that the prosecution "suppressed" information about a "deal" with an important witness against the Petitioner and failed to act when that witness made statements during Petitioner's trial that "bordered on perjury." The District Court's ruling, predicated upon a finding of intentional prosecutorial misconduct, is particularly appalling because said decision is based on totally inadequate information and makes suppositions from these facts which are simply not true.

The District Court's decision was based solely on facts developed in the state habeas corpus proceeding. Although only passing reference is made in the District Court's Memorandum to the state court decision by Judge Martin (See f.n. 15, p. 11 of the Memorandum), the fact remains that in federal collateral proceedings such as this, the findings of the state court as presumptively correct pursuant to 28 U.S.C. §2254 (d). See *Tanner* v. *Vincent*, 541 F.2d 932, 937 (2nd Cir. 1976); *LaVallee* v. *Della Rose*, 410 U.S. 790, 93 D. Ct. 1203, 35 L. Ed.2d 637 (1973); *Winford* v. *Swenson*, 517 F.2d 1114, 1118 (8th Cir. 1975); *United States ex rel. Sabella* v. *Follette*, 432 F.2d 572 (2nd Cir. 1970). The District Court makes no attempt to discuss what is wrong with the state court's finding of fact-both as to what happened at Petitioners trial and the impact that withheld information would have had on the jury — and proceeds to make its own independent judgment, without

having heard any evidence which was not before the state court. The District Court never heard a single witness but, rather, made it's determination on the basis of documents submitted to it. The only evidence the District Court had before it of any alleged "deal" with the witness, Bruce Pino, was a transcript (Plaintiffs Exhibit B, introduced at the hearing on the merits held January 26, 1976; App. pp.39a-40a) of Pino's testimony in the case of *State* v. *Albert Porto Jr.*, Docket No. 16974, where Pino, in response to questions posed by the State's Attorney during his direct examination, described generally his interpretation of the deal he had supposedly made. That transcript contains the following exchange (at pp. 120, 121):

> Q. (By The Assistant State's Attorney, Mr. Redway) — Were there any other offenses that were pending against you?
>
> A. I have one case pending in this court for possession of marijuana. I was arrested, December of '68.
>
> Q. Was that part of the understanding that you made on January 26, 1970?
>
> A. Yes, It was.
>
> Q. And what was *your understanding* of the agreement in that regard?
>
> A. That I wouldn't go to jail.
>
> Q. All right, Why did you make this agreement, Mr. Pino?
>
> A. It was about the only way I could break away from the criminal element that I was dealing with, was the main reason.
>
> Q. And at the time you were incarcerated, is that correct?
>
> A. Yes.
>
> Q. And you had not made bond?
>
> A. No, I didn't.

Q. Who did you make this agreement with?

A. Made the agreement with Steve Ahern, Ray Conley, an FBI Agent, and Stanley Sagarin, who represented the government, he was a U.S. attorney, and Mr. Markle."

At the hearing on the merits held before the District Court (Blumenfeld, J.) on January 26, 1976, the court appeared to recognize the difficulties inherent in determining the scope of any "deal" from a simple transcript of another unrelated proceeding, as can be gleaned from the following colloquoy (at pp. 32-33 of the transcript of the hearing on the merits; App. pp. 40a - 41a):

"Mr. JACOBS: The Exhibit B, which is the testimony of the witness Pino in the Porto case a year later, indicates that the agreement was made with Mr. Sagarin, representing the United States Government, he was then Assistant United States Attorney and with Mr. Markle, who was the State's Attorney then and at all times since.

The COURT: An agreement to do what?

Mr. JACOBS: An agreement that he would not have to serve any time for the pending marijuana charges.

The COURT: Well you've got some evidence, then?

Mr. JACOBS: It's all in here, your Honor.

The COURTS: It's all in there from Pino?

Mr. JACOBS: Right.

The COURT: But it isn't there from Sagarin or Markle. The thing has not been decided that he had that. That's what he says."

Since the District Court referred the matter back to the state court, a subsequent hearing was held before Judge Martin at Litchfield County, Superior Court on February 24, 1976. At this time, the Petitioner through counsel, felt that his posi-

tion was adequately explained by the *Porto* case transcript and a stipulation reached between counsel and the Assistant State's Attorney (Mr. Diette), (as found in the Joint Appendix, pp.):

> By Mr. JACOBS: May it please the Court, with respect to Exhibit "C", the transcript of the testimony of Bruce Pino in the case of Albert Porto which occurred after the trial of the Annunziato case, we have stipulated with the — with Mr. Diette representing the State's Attorney as follows:
>
> That the testimony of Mr. Pino as contained in that transcript *with respect to the agreement that he reached with the State's Attorney's office in New Haven for favorable treatment is, in fact, true; and that he, in fact, prior to his testimony in the Annunziato case,* had agreed with the State's Attorney's Office in New Haven and they had agreed with him to give him favorable treatment among other things for his testimony in the case of *State* v. *Salvatore Annunziato*, being file #16,800 in the Superior Court at New Haven County. . . .(and at p. of the Joint Appendix)
>
> By Mr. JACOBS: Yes, I would like to add to that, when I talked about the agreement by the State's Attorney's Office in New Haven County to give favorable treatment to Bruce Pino, I referred to favorable treatment on the charges then pending against him in the Superior Court for New Haven County that are set forth in Exhibit #1 on, Exhibits that we have offered here, the possession of drug charges and the second offender charges which were, in fact, nolled after the — sometime after the Annunziato case was tried.
>
> If I correctly stated, I would rather stand corrected.
>
> By Mr. DIETTE: I would say, basically yes, sir.

That stipulation — i.e, that the State's Attorney, Mr. Markle, as indicated by Pino's testimony in the *Porto* case, had participated in a "deal" with Pino that he would receive "favorable treatment" on his pending marijuana charge if he testified against the Petitioner — was all that the Respondent had ever agreed to. The Respondent has claimed throughout these proceedings that the then Assistant State's Attorney Dennis Gaffney, who prosecuted the Petitioners case, had no knowledge of the State's Attorney's "deal" on the pending marijuana charge. In his Memorandum, the District Court states that "The state has not challenged the accuracy of Pino's account of the deal." This assertion is accurate only as it relates to Pino's claim about the only "deal" within the State's Attorney's power — ie, as to the pending marijuana charge. There has *never* been any agreement by the state nor has there been any evidence to prove that all the other facets of the deal (as claimed by Pino) were true and there certainly has been no record created on whether the State's Attorney (Mr. Markle), who apparently did not inform the Assistant State's State's Attorney (Mr. Gaffney) about this office's agreement with Pino, ever, in fact, knew himself of the alleged promises made by federal and local police authorities.

The District Court's finding of prosecutorial misconduct is predicated upon its belief that the "deal" with Pino consisted of much more than consideration on a pending marijuana charge. As the District Court states, (at pp. 15-16 of the Memorandum of Decision, Document No. 13 of the Record on Appeal; App. pp. 229-234):

> "Pino's credibility was subjected to considerable scrutiny. Both sides elicited the fact that he had received leniency in the form of a suspended sentence on a bank robbery conspiracy offense in return for his testimony at peti-

> tioners trial among others. In addition, the trial judge specifically charged the jury concerning a possible interest or bias on Pino's part. *But testimony of the complete deal would not have been merely cumulative. To assure his testifying the police had promised to afford Pino with protection and provide him with a new home and identity. His own safety and continued well-being then depended upon his cooperation with the authorities. The pending drug possession and second offender charges are also significant.* They were crimes still hanging over Pino's head. Unlike the bank robbery for which he had already been sentenced. In the face of Pino's denial as to the existence of any promise and the suppression by the prosecution of the full terms of the deal, defense counsel's argument challenging Pino's motive and interest was reduced to speculation and inference. . . .I conclude therefore that if Pino's arrangement with the government had been completely deliniated and his inducements to testify fully explored, there is a reasonable likelihood that the jury's judgement would have been affected." (emphasis added)

Clearly, the District Court, which recognized the inadequacy of the record to prove an indictment as serious as "prosecutorial misconduct" at the time of the hearing on the merits on January 26, 1976, somehow became persuaded in the interim period not only that the record was adequate (despite the absence of any additional evidence during the state court hearing) but that the depth of its awareness of what transpired internally at the State's Attorney's Office was sufficient to bring such a sweeping indictment.

The tenous evidentiary basis of the District Court's finding can perhaps best be demonstrated by it's remarkable statement, (at pg. 13 of the Memorandum of Decision, Doc. No. 13, of the Record on Appeal), that Pino's testimony, in response to questioning by Mr. Gaffney, that no one had ever made a

"promise" for his testimony, "was false, even bordering on perjury." This assessment is remarkable since if one were to accept, at face value, Pino's statement of what he had been promised, as evidenced by the *Porto* case transcript, then there is imply *no question* but that Pino committed perjury. Why does the District Court hesitate to carry the accusation to that extent? It is submitted that such "restraint" is a reflection of the totally inadequate factual basis the court had for making an informed judgment about this particular matter. In short, the District Court's finding on the "state's misbehavior" is both unsupported and factually untrue. At the very least, a remand to the District Court for development of the facts as to what was and was not known by the prosecution, and what Pino's understanding of the "deal" *at the time of Petitioner's trial*, would seem to be warranted. This was the action taken by this court, under a similar set of circumstances, in *United States* v. *Hilton*, 521, F.2d 164, 166 (2nd Cir. 1975).

The standard to be applied in reviewing the consequence of a failure to reveal *Brady* material, has been summarized in the *Hilton* case, *supra*, 521 F.2d at 166, as follows:

> "If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense. But if the government's failure to disclose is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." See *United States* v. *Rosen*, 516 F.2d 269 (2nd Cir. 1975); *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2nd Cir. 1974); *United States* v. *Kahn*, 472 F.2d 272, 287 (2nd Cir. 1973); *United States* v. *Miller*, 411 F.2d 825, 832 (2nd Cir. 1969).

As this Circuit has recognized in *United States* v. *Stassi*, 544 F.2d 578, 584 (2nd Cir. 1976), a more exacting standard for the granting of a new trial in cases such as this has been established by the United States Supreme Court, in *United States* v. *Agurs*, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976). Under the rule established in *Agurs, supra*, a reviewing court must determine, in the context of the entire record, whether the omitted evidence raises a reasonable doubt as to the defendant's guilt. The District Court, predicating its ruling on the basis of its disputed finding of intentional prosecutorial misconduct and suppression of perjured testimony, found that the "suppressed" evidence led the court to believe that there was a reasonable doubt as to the defendant's guilt.

It must be noted that the District Court's ruling was simply a substituted factual finding, in effect overruling the factual determination of Judge Martin in the state court, that the impact of the withheld information would not have been sufficient to induce a reasonable doubt in the minds of enough jurors to avoid a conviction, citing the case of *United States* v. *Stofsky*, 527 F.2d 237 (2nd Cir. 1975). Despite the fact that *United States* v. *Agurs, supra*, has indicated that an even more restrictive standard should be used to determine when a new trial is appropriate. See *United States* v. *Stassi, supra*, 544 F.2d 578 at 584, nevertheless, the District Court, obviously appalled by what it considered (on totally inadequate evidence) to be a case of intentional prosecutorial misconduct, determined to substitute it's own determination on the factual issue, despite the presumption of correctness which that judgment is supposed to enjoy, under 28 U.S.C. §2254 (d); *Tanner* v. *Vincent, supra*, 541 F.2d at 937 (2nd Cir. 1976).

Whichever standard is employed, it is clear that if any deference is to be shown the state courts judgment, the District Court could not reasonably have found, using the *Agurs standard*, that a reasonable doubt as to the Petitioners guilt could arise from the evidence which was not revealed here. Thus, the only *proven* Brady "fact" not revealed to the Petitioner at the time of trial was that the witness, Pino, in addition to all of the other instances of "favorable treatment" which he had received in the past because of his co-operation as a government witness was also, in the future, going to have his co-operation in Petitioner's case taken into account concerning the disposition of a pending narcotics charge, (It should be noted that the "possibility" of favorable treatment may explain Pino's testimony that no "promises" had been made to him by the State's Attorney's Office, since nowhere does the record indicate, although a nolle of the charges was subsequently entered, that this had been the express quid pro quo exacted for his testimony. Again, because no evidence explaining the ambiguous claim of a "deal" from the *Porto* transcript was ever offered, the District Court was left free to immortalize a "deal" which, in fact, may never have occurred). Both the Supreme Court of Connecticut, in *State* v. *Annunziato, supra,* and the state habeas court (Martin, J.) in *Annunziato* v. *Manson, supra,* had weighed the amount of evidence already offered to affect the impeachment of Bruce Pino's credibility and determined that the added factor that he had been told that his testimony would be taken into consideration on his pending charges, would have been simply cumulative and that the jurors were well advised, by the evidence which was admitted, that Pino had an interest or motive for testifying against the Petitioner. This factual determination was nullified by the District Court on the obvious basis that the court felt that the

witness had become "a professional witness for the state" and was receiving much more than leniency on one pending marijuana charge. The fact remains that there was absolutely no proof before the District Court that such a far-reaching "deal" had been made or that the State's Atorney's Office had been aware of it, if it had been made. The Respondent emphatically denies that it ever had such knowledge and requests, at the very least, that this case be remanded to the District Court for a more adequate development of the facts on this most crucial question.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,
The State of Connecticut

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